Conversent
Communications

June 5, 2006

Mary L. Cottrell, Secretary
Massachusetts Department of Telecommunications and Energy
One South Station
Boston, MA 02110

Re: *In re Investigation by the Department of Telecommunications and Energy on its own Motion to Establish Retail Billing and Termination Practices for Telecommunications Carriers,* DTE 06-08.

Dear Secretary Cottrell:

The comments of Conversent Communications of Massachusetts, Inc. in response to the issues raised by the Order Opening a Notice of Inquiry to Establish Retail Billing and Termination Practices for Telecommunications Carriers, dated April 7, 2006, are enclosed for filing.

Thank you for the opportunity to comment. Please contact me (401-834-3326 direct dial or gkennan@conversent.com) if you have any questions.

Very truly yours,

Gregory M Kennan

Gregory M. Kennan
Director, Regulatory Affairs and Counsel

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of Telecommunications and Energy on its own Motion to Establish Retail Billing and Termination Practices for Telecommunications Carriers	**D.T.E. 06-08**

COMMENTS OF
CONVERSENT COMMUNICATIONS OF MASSACHUSETTS, INC.

Conversent Communications of Massachusetts, Inc. ("Conversent") respectfully comments as follows on the issues raised by the Order Opening a Notice of Inquiry to Establish Retail Billing and Termination Practices for Telecommunications Carriers, dated April 7, 2006 ("Opening Order").

Conversent first addresses the threshold question whether the Department should extend the "Rules and Practices Relating to Telephone Services to Residential Customers" ("Practices") to small business customers (which the Department defines for this purposes as business customers with three lines or less). It should not. There is no indication that there are significant consumer protection problems in the small business market. The Department should not try to fix something that is not broken.

Conversent also addresses a number of specific issues set forth in the Opening Order. Conversent's discussion of these matters is contingent, and applies only if the Department were to determine to extend the Practices to business customers. Conversent does not offer residential service and expresses no view as to the application of the Practices to residential service.

Threshold Issue — Extending the Practices to Small Business Customers

The Department should not extend the Practices to small business customers (which the Department defines as those with three or fewer lines).

There is no indication that small business customers are in need of the additional protections that the Practices afford residential customers. Businesses generally are deemed to be more sophisticated in commercial and legal matters than are individuals. Businesses, therefore, are better able to fend for themselves in dealings with other businesses. They have less need for regulatory protection than do individuals.

There also is no evidence that small businesses are subject to consumer protection abuses that require additional regulation. In the absence of such evidence, the Department may not and should not impose additional regulation on telecommunications providers.

Distinguishing between small business customers (as defined) and other business customers would impose an undue burden on smaller carriers like Conversent. Applying different billing, collection, and termination procedures to one set of customers versus another will drive up the cost and complexity of doing business. Increased costs either will be passed through to customers in the form of increased rates, or will be absorbed by the carrier, potentially weakening its financial health. A clever carrier could game the system by selling a business a fourth line (whether or not the business really needs it) to escape the reach of the regulations. Thus, there is a potential detriment to the very business customers the rule ostensibly was designed to protect. In the absence of a problem, the illusory benefit of extending the Practices to small business customers is far exceeded by the potential cost.

Small business customers will not be unprotected if the Department declines to extend the reach of the Practices to them. Small businesses will continue to benefit from a wide array of consumer protections. Among the many examples are the general requirements that a provider's rates be fair, reasonable, nondiscriminatory, and non-preferential. G.L. c. 159, § 14. Its regulations, practices, equipment, appliances, and service must be just, reasonable, safe, adequate, and proper. G.L. c. 159, § 16. Business customers are protected against slamming. G.L. c. 93, §§ 108-113; 220 CMR 12.00. Truth-in-billing requirements protect both business and residential customers. 47 C.F.R. § 64.2401.

Business customers are sufficiently well protected by the many regulations to which telecommunications providers are subject. There is no need to increase the level of regulation — with attendant costs — of providers of business telecommunications services.

Issues Raised in the Opening Order

A. General Questions

In General. Consumers should receive fair, accurate, and non-misleading information about services and prices. To that end, it is appropriate for the Department to impose general requirements to achieve this goal. The Department should not over-prescribe the means to accomplish this in the business market, however. Businesses may have different needs than residential customers and should be considered at a higher level of sophistication than residential customers. Thus, the Department should not prescribe such issues as the precise layout of bills or customer notices.

Migration Guidelines. Conversent also would like to see the Department adopt carrier-to-carrier migrations guidelines like those in effect in New York,[1] New Hampshire,[2] and Maine.[3]

[1] *In re Proceeding on the Motion of the Commission to Examine the Migration of Customers Between Local Carriers,* Case 00-C-0188, Order Adopting Phase II Guidelines (June 14, 2002).

[2] *In re CLEC-to-CLEC Migration Guidelines,* DT 02-132, Order Adopting CLEC to CLEC Migration Guidelines, Order No. 24,200 (Aug. 15, 2003), http://www.puc.state.nh.us/Regulatory/Orders/2003orders/24200t.pdf .

Conversent has experienced problems in Massachusetts on such matters as obtaining customer service records (CSRs) from other carriers for customers that have indicated a desire to switch to Conversent and have signed the necessary authorizations. While Massachusetts adopted mass-migration guidelines in DTE 02-28, those cover extraordinary, mass migration events and do not cover the day-to-day migration of customers between carriers. As in the three other states listed above, the guidelines should cover such matters as exchange of customer service records and should prohibit improper winback marketing on after receipt of a migration request.

Such migration guidelines are properly viewed as consumer protection mechanisms. They facilitate a customer's ability to obtain service from the carrier of choice and eliminate improper obstacles to the exercise of such choice.

B. Scope of Rules

The new Practices should apply even-handedly to carriers that offer similar services. From a consumer protection point of view, there is no principled reason to distinguish among providers of similar services on the ground that they are ILECs, CLECs, cable telephony, or VOIP providers.[4]

C. Customer Notice

As stated above, customers have the right to receive fair, accurate, and non-misleading information about service offerings, rates, terms, and conditions. Beyond these general principles, however, in the business segment, the Department should leave the details to the market. While it is fair and a matter of simple business courtesy and good customer relations

[3] Available at http://mpuc.informe.org/easyfile/cache/easyfile_doc173304.PDF.

[4] This is not to suggest that there is inter-modal competition in the small-business market at present. There is not.

that a carrier notify its customer of changes in rates or changes in control of the carrier, there is no need for the Department to prescribe the form, time limit, or even the necessity of such notice.

D. Billing

Manner of Delivery. The Department should permit delivery of bills in any reasonable manner upon which a business customer and a provider of business telecommunications services may agree. In particular, electronic billing should be allowed if the customer and provider agree. A carrier should not be permitted to require the customer to accept electronic billing against the customer's will, however.

Line Items on Customer Bills. The Department's jurisdiction in this area is limited. Federal regulations govern the form and content of telecommunications carrier bills. With respect to descriptions of billed charges, those regulations primarily require that the descriptions be "brief, clear, non-misleading, [and] plain language." 47 C.F.R. § 64.2401(b). These general federal regulations apply to both the interstate and intrastate portions of the bill. *In the Matter of Truth-in-Billing and Billing Format,* CC Docket No. 98-170, First Report and Order and Further Notice of Proposed Rulemaking, FCC 99-72, ¶ 21 (May 11, 1999) ("*Truth in Billing Order*").

The FCC regulations (applicable to both the interstate and intrastate portions of the bill) also govern the state's authority to enact and enforce truth-in-billing requirements. "The requirements contained in this subpart are not intended to preempt the adoption or enforcement of *consistent* truth-in-billing requirements by the states." 47 C.F.R. § 64.2400(c) (emphasis added). The FCC has explained the state's authority thusly: "[S]tates will be free to continue to enact and enforce additional regulation *consistent with* the general guidelines and principles set forth in this Order, including rules that are more specific than the general guidelines we adopt today." *Truth in Billing Order,* ¶ 26 (emphasis added).

Thus, while under current FCC rules[5] the Department has some authority to regulate in this area, that authority is limited. The key element is whether a state requirement is "consistent" with the federal regulations. The dictionary definition of "consistent" is:

> **a :** marked by harmony, regularity, or steady continuity throughout **:** showing no significant change, unevenness, or contradiction <in art all styles are good provided ... they are *consistent* and harmonious within themselves -- J.W.Krutch> <the influence of America should be *consistent* in seeking for humanity a final peace -- F.D.Roosevelt> **b :** marked by agreement and concord <opinions *consistent* with each other> **:** coexisting and showing no noteworthy opposing, conflicting, inharmonious, or contradictory qualities or trends **:** COMPATIBLE -- usually used with *with* <drinking more hollands and water than is *consistent* with decorum -- George Borrow> <is your aunt's romanticism always *consistent* with accuracy -- Edith Wharton> . . . .

Webster's Third New International Dictionary, Unabridged (available at http://unabridged.merriam-webster.com/).

The precise contours of the state's authority in this area would require an exhaustive examination of federal preemption law. There is no doubt, however, that a state requirement that prohibits something that the FCC has expressly permitted cannot be "consistent" — marked by harmony, agreement, and concord; coexisting and showing no noteworthy opposing, conflicting, inharmonious, or contradictory qualities — with the federal requirement.

Thus, the state lacks authority to prohibit line-item charges on customer bills. The FCC has expressly held that line-item charges are permitted on telecommunications bills. Last year, the FCC explained in detail:

> There is no general prohibition against the use of line items on telephone bills under our rules or the Act. . . . [N]othing in the *Truth-in-Billing Order* prohibits carriers from using non-misleading line items. To the contrary, the *USF Contribution Order* states that while carriers cannot include administrative costs under the umbrella of regulatory charges, they may recover such costs through their rates or "other line items." The truth-in-billing rules require that charges

[5] However, the FCC has tentatively concluded that states no longer should be able to enact more specific truth-in-billing requirements. See below.

> contained on telephone bills be accompanied by a brief, clear, non-misleading, plain language description of the service or services rendered. If carriers choose to offer descriptions of various charges in the form of line items, however, there is nothing in the existing Truth-in-Billing requirements to prevent them from doing so. Nor do we believe there is any basis to conclude that such a practice is "unreasonable" under section 201(b). As several commenters have noted, the provision of accurate and non-misleading information on a telephone bill may be useful information to the consumer in better understanding the charges associated with their service and making informed cost comparisons between carriers. In sum, we reiterate that carriers are not prohibited *per se* under our existing Truth-in-Billing rules or the Act from including non-misleading line items on telephone bills.

In the Matter of Truth-in-Billing and Billing Format, CC Docket No. 98-170, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, FCC 05-55, ¶ 23 (March 5, 2005) ("*Truth in Billing Declaratory Ruling*") (footnotes omitted).

Importantly, in the *Truth in Billing Declaratory Ruling,* the FCC specifically denied NASUCA's petition seeking a prohibition against all line items or charges that have not been specifically authorized or mandated by the government. *Id.* Thus, if the Department's intention is to prohibit certain line items for services, particularly interstate services, that a carrier may charge, such a proposal would flatly contradict the FCC's denial of the NASUCA petition. That is because the Department would be attempting to impose the same restrictions that the FCC expressly considered and rejected. That is inconsistent with the federal requirements and therefore impermissible.

To be sure, under current FCC regulations, the Department may enact and enforce prohibitions against unclear or misleading descriptions associated with line items. But that is a very different matter from proscribing certain line items or types of line items. The FCC rejected NASUCA's similar proposal. A Department order limiting the types of permissible line items would be prohibited.

Conversent further notes that the FCC is considering changes to the respective roles of itself and state commissions in the regulation of customer telecommunications bills. Under the *Truth-in-Billing Order,* state commissions currently may enact more specific rules consistent with the FCC's general truth-in-billing guidelines. However, in the *Truth-in-Billing Declaratory Ruling,* the FCC tentatively concluded that it should reverse its prior determination that states may enact and enforce more specific state truth-in-billing requirements. The FCC stated:

> [W]e tentatively conclude that we should reverse our prior pronouncement that states may enact and enforce more specific truth-in-billing rules than ours. . . .
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> . . .
>
> In accord with our precedents, we tentatively conclude that the line between the [FCC]'s jurisdiction and states' jurisdiction over carriers' billing practices is properly drawn to where states only may enforce their own generally applicable contractual and consumer protection laws, albeit as they apply to carriers' billing practices. We emphasize that our tentative conclusion does not limit a state's ability to assess taxes or create, for example, a state-specific universal service fund to which carriers must contribute. Furthermore, we believe that states' enforcement of their own generally applicable contractual and consumer protection laws – to the extent such laws do not require or prohibit the use of line items -- would not constitute rate regulation under section 332(c)(3)(A). However, states would be preempted from enacting and enforcing specific truth-in-billing rules beyond the rules, guidelines, and principles that the [FCC] has adopted, and that we may adopt in an order responsive to this *Second Further Notice.*

Truth-in-Billing Declaratory Ruling, ¶¶ 51, 53 (footnote omitted).

Whether and when the FCC might adopt this tentative conclusion are unknown. However, it would be confusing to consumers and disruptive to carriers' operations if the Department were to mandate a set of requirements now and then lose its authority to do so in the near term. Any Department-mandated changes likely will be undone should the FCC adopt its tentative conclusion. To avoid unnecessary, confusing, and expensive changes in billing systems and bill formats, the Department should not attempt to restrict the line items that carriers may utilize on their bills.

E. Credit Requirements, Deposits, Late Payments

Late Payment Charges. In accordance with the general principle that the customer is entitled to full information about the charges it may incur, it would be appropriate for the Department generally to require full, fair, and non-misleading disclosure of late payment charges.

The Department should not prescribe or limit the late payment charges that a carrier may impose, however. Providers should be allowed to set late payment charges at a level high enough to discourage late payments.

Telecommunications providers are not in the banking business. Placing a too-low limit on late payment charges could force carriers to become unwilling lenders of last resort to customers who fail or refuse to pay their bills. To obtain a "loan" from a telecommunications provider, a customer need not visit a bank, persuade a loan officer, put up collateral, or seek an "angel" investor; it simply does not pay the bill. This unfairly forces a carrier to increase its working capital requirements, perhaps by drawing on its own line of credit. The Department should not force carriers to incur this unnecessary financial burden.

It would be appropriate for the Department to require carriers to suspend the assessment of late charges when a customer legitimately disputes part or all of a bill. If the carrier prevails, however, late payment charges should apply back to the date when the disputed bill became due.

Deposits. Providers should be allowed to require assurance of payment from business customers through any commercially reasonable means, including but not limited to cash deposits. Assurance-of-payment mechanisms would be familiar to most businesses. The department should not prescribe the form or amount of such mechanisms or the circumstances under which they may be used.

F. Termination

Customers should be entitled to reasonable notice of termination. The purpose of the notice should be to give the customer one last chance to cure the payment delinquency. However, the notice period should be reasonable, no more than 5 business days. A too-long notice period allows a customer to run up the bill before disconnection, which bill easily could prove uncollectible. A 5-business day notice period is a reasonable balance between allowing the customer to cure the delinquency and reducing the carrier's exposure form uncollectible accounts.

Notices should be allowed in the same from as the bill. If the customer has agreed to receive electronic billing, it is appropriate to permit electronic termination notices.

H. Billing and Service Disputes

The Department is an effective mediator between providers and customers. Conversent would support a mediation role for the department in disputes between providers and business customers.

June 5, 2006

Respectfully Submitted,

Gregory M Kennan

Gregory M. Kennan
Conversent Communications of
Massachusetts, Inc.
24 Albion Road, Suite 230
Lincoln, RI 02865
401-834-3326 Tel.
401-834-3350 Fax
gkennan@conversent.com